

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CRAIG DION RONEY,

Defendant-Appellant.

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UNPUBLISHED

March 27, 2007

No. 265071

Jackson Circuit Court

LC No. 05-000871-FH

Before: Smolenski, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for felon in possession of a firearm, MCL 750.224f; carrying or possessing a firearm during the commission of a felony, MCL 750.227b; carrying a concealed weapon, MCL 750.227(2); and resisting and obstructing, MCL 750.81d(1). Defendant was sentenced as an habitual offender, second-offense, MCL 769.10, to 1 year, 11 months to 7 years, 6 months' imprisonment for the felon in possession conviction; 1 year, 11 months to 7 years, 6 months' imprisonment for the carrying a concealed weapon conviction; and, 1 to 3 years' imprisonment for the resisting and obstructing conviction; all of which are to be served consecutively to a term of 2 years' imprisonment for the felony-firearm conviction. We affirm defendant's convictions, but remand for correction of the judgment of sentence.

Officer William Mills testified that at approximately 2:00 a.m. on the date of the incident, he was in uniform and driving a marked police vehicle while conducting an investigation in a neighborhood where a suspect in an unrelated crime was allegedly "hanging with some friends" near a large white or gray vehicle. Mills saw a large, cream-colored Cadillac with several people inside of it and standing around it. Mills got out of his vehicle and started walking toward the Cadillac. Defendant, who was standing on the other side of the Cadillac, began to walk away. Mills called out to defendant, "hey, come on over here for a second and talk to me." Defendant turned to face Mills, acknowledging that he heard Mills talking to him. Mills saw defendant's right arm drop as though he was "grabbing something" out of his waistband, and then heard a "clunking noise on the ground."

Mills could not see the object defendant dropped because his view was obscured by a vehicle that was parallel parked in front of the Cadillac. However, Mills never lost sight of defendant from his chest up. Mills was familiar with the noise and was "sure it was a handgun that was just thrown on the ground." Mills unholstered his weapon, pointed it at defendant, and

told him to put his hands in the air and stop. Defendant put his hands in the air but continued to walk backwards. Mills called for his police dog, and defendant began to walk faster, eventually turning and running away. Mills warned defendant to stop or he would sic the dog on him. Mills deployed the dog and went to the location where he was certain he heard defendant drop a gun, and found a Glock handgun on the ground. Mills heard defendant screaming and thought the dog had caught defendant, so he called the dog back, staying with the gun the entire time. When backup police officers arrived at the scene, Mills picked up the gun with rubber gloves and locked it in his vehicle. Mills then went with the dog to track defendant, and found him hiding under a van approximately six blocks away. Defendant tried to run away, but the dog grabbed the back of defendant's leg and tore his jeans. Mills ultimately apprehended defendant and took him into custody, where a search of his person uncovered a bag of marijuana.

Defendant argues that his Fourth Amendment rights were violated during his encounter with Officer Mills. Specifically, defendant argues that the stop was unconstitutional because Officer Mills had no articulable suspicion to stop him. We review this unpreserved claim of constitutional error for plain error that affected defendant's substantial rights. *People v Russell*, 266 Mich App 307, 314; 703 NW2d 107 (2005). "To avoid forfeiture under the plain error rule, defendant must show that: (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error prejudiced substantial rights, i.e., that the error affected the outcome of the lower court proceedings." *Id.* at 314-315.

Both the United States Constitution and Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. However, "[t]o sustain an attack on the propriety of a search or seizure, the challenged search or seizure must have infringed upon an interest which article 1, § 11 of the Michigan Constitution or the Fourth Amendment of the United States Constitution was designed to protect." *People v England*, 176 Mich App 334, 343; 438 NW2d 908 (1989). Accordingly, the proper "inquiry begins with the question of whether a search or seizure occurred which activated the constitutional protections." *Id.*<sup>1</sup>

"[T]o constitute a seizure for purposes of the Fourth Amendment there must be either the application of physical force or the submission by the suspect to an officer's show of authority." *People v Lewis*, 199 Mich App 556, 557; 502 NW2d 363 (1993). "The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. . . . It does not remotely apply, however, to the prospect

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<sup>1</sup> It is well-settled that a "police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *People v Custer*, 465 Mich 319, 326-327; 630 NW2d 870 (2001), quoting *Terry v Ohio*, 392 US 1, 22; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Further, "[a] brief, on-the-scene detention of an individual is not a violation of the Fourth Amendment as long as the officer can articulate a reasonable suspicion for the detention." *Id.* at 327. "Police officers may make a valid investigatory stop if they possess 'reasonable suspicion' that crime is afoot." *Id.*, quoting *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). However, because defendant was not seized at the time he abandoned his gun, no Fourth Amendment issues were implicated.

of a policeman yelling “Stop, in the name of the law!” at a fleeing form that continues to flee. That is no seizure.” *Id.*, quoting *California v Hodari D*, 499 US 621, 626; 111 S Ct 1547; 113 L Ed 2d 690 (1991).

Here, defendant abandoned his gun while fleeing from Officer Mills, and was not seized until his ultimate apprehension by Mills’ dog. Even assuming Mills’ chase amounted to a show of authority, no seizure occurred because defendant fled and did not submit to the show of authority. Accordingly, because the requisite seizure necessary to activate the constitutional protections of the Fourth Amendment did not occur, defendant has forfeited the issue by failing to demonstrate plain error affecting his substantial rights.

Defendant next argues that he was denied the effective assistance of counsel when his attorney failed to challenge the purportedly illegal seizure. However, as noted above, defendant’s Fourth Amendment rights were not implicated because no seizure occurred. Ineffective assistance of counsel claims cannot be predicated on the failure to make a meritless motion. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003). Accordingly, defendant was not denied the effective assistance of counsel where defense counsel did not make a futile challenge.

Defendant also argues that there was insufficient evidence to sustain his convictions for felon in possession, MCL 750.224f, and felony firearm, MCL 750.227b. We review de novo challenges to the sufficiency of the evidence to determine whether, when viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found all the elements of the charged crime to have been proven beyond a reasonable doubt. *People v Cox*, 268 Mich App 440, 443; 709 NW2d 152 (2005). This Court will not interfere with the trier of fact’s role of determining the weight of the evidence or the credibility of the witnesses. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

The felon in possession statute prohibits a person convicted of a specified felony from possessing a firearm if fewer than five years have passed since the person paid all fines, served all terms of imprisonment, and successfully completed all terms of probation or parole imposed for the violation.<sup>2</sup> MCL 750.224f(2); *People v Perkins*, 262 Mich App 267, 269-271; 686 NW2d 237 (2004). The elements of felony firearm, MCL 750.227b, are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Defendant argues that his mere presence near the location where Officer Mills found the gun was insufficient to sustain his convictions for felon in possession and felony firearm. Mere presence near a weapon is not enough to sustain a conviction for possession of that weapon. *People v Wolfe*, 440 Mich 508, 527; 489 NW2d 748 (1992). However, additional evidence was presented to support defendant’s convictions. Officer Mills testified that when he called out to defendant, defendant’s right arm dropped as though he was grabbing something out of his

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<sup>2</sup> The parties stipulated that defendant had a prior conviction for armed robbery, a specified felony under MCL 750.224f(2) and (6)(i), and had not yet gained eligibility to possess a firearm.

waistband, followed by the distinctive sound of a gun hitting the pavement. Mills never lost sight of defendant from the chest up, no one else was near defendant, and Mills found a gun at the precise location where defendant made the arm motion and from where the noise originated. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of a crime. *Williams, supra* at 419. Accordingly, viewing the circumstantial evidence and reasonable inferences drawn from that evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of felon in possession and felony firearm were proven beyond a reasonable doubt.

Defendant next argues that his convictions for both felon in possession and felony firearm violate the federal and state prohibitions against double jeopardy.<sup>3</sup> We review unpreserved claims of constitutional error for plain error that affected defendant's substantial rights. *Russell, supra* at 314. This issue was specifically decided by our Supreme Court in *People v Calloway*, 469 Mich 448, 450-452; 671 NW2d 733 (2003). Our Supreme Court noted that, with the exception of the four enumerated felonies set out in the felony-firearm statute, MCL 750.227b(1), "it was the Legislature's intent 'to provide for an additional felony charge and sentence whenever a person possessing a firearm committed a felony other than those four explicitly enumerated in the felony-firearm statute.'" *Calloway, supra* at 452, quoting *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998). "Because the felon in possession charge is not one of the felony exceptions in the statute, it is clear that [a] defendant could constitutionally be given cumulative punishments when charged and convicted of both felon in possession, MCL 750.224f, and felony-firearm, MCL 750.227b." *Calloway, supra* at 452. No violation of the double jeopardy clause occurred.

Defendant argues that the trial court erred by instructing the jury that the parties stipulated to defendant's prior felony conviction, essentially indicating that the prosecutor only had to prove the element of possession beyond a reasonable doubt to sustain convictions for felon in possession and felony firearm. However, defendant waived any claim of error by expressly approving the jury instructions as given. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004).

Defendant also argues that he was denied the effective assistance of counsel when his attorney failed to object to the above-referenced jury instructions. Our review of this unpreserved issue is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). To establish ineffective assistance of counsel, defendant must overcome a strong presumption that defense counsel's performance constituted sound trial strategy. *Matuszak, supra* at 58.

Before trial, defense counsel indicated his concern that defendant would be prejudiced if the jury were to discover the nature of defendant's prior felony conviction and accordingly stipulated to the prior conviction for purposes of the felon in possession and felony-firearm charges. Defense counsel's decision to stipulate to defendant's prior conviction was clearly strategic, and we will not substitute our judgment for that of trial counsel on such matters.

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<sup>3</sup> US Const, Am V; Const 1963, art 1, § 15.

*People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Because the appellate record does not support defendant's assertion of ineffective assistance of counsel, he has waived the issue.

Finally, defendant argues that the trial court erred in ordering his sentence for felony firearm to be served consecutively to the sentences for all of his other convictions. We review this unpreserved claim of sentencing error for plain error that affected defendant's substantial rights. *People v Sexton*, 250 Mich App 211, 228; 646 NW2d 875 (2002).

A defendant is entitled to resentencing where a sentencing court fails to exercise its discretion because of a mistaken belief in the law. *Id.* However, a trial judge is presumed to know the law. *Id.* Here, it is evident that the trial judge erroneously believed that he could order defendant's sentences for felon in possession, carrying a concealed weapon, and resisting and obstructing all to be served consecutively to his sentence for felony firearm. However, our Supreme Court has stated that "[f]rom the plain language of the felony-firearm statute, it is evident that the Legislature intended that a felony-firearm sentence be consecutive only to the sentence for a specific underlying felony." *People v Clark*, 463 Mich 459, 463; 619 NW2d 538 (2000). Because MCL 750.227b(2) "clearly states that the felony-firearm sentence 'shall be served consecutively with and preceding any term of imprisonment for the conviction of the *felony* or attempt to commit the *felony*,'" "[i]t is evident that the emphasized language refers back to the predicate offense discussed in [MCL 750.227b(1)], i.e., the offense during which the defendant possessed a firearm." *Clark, supra* at 464. "No language in the statute permits consecutive sentencing with convictions other than the predicate offense." *Id.*

Here, the prosecutor listed felon in possession as the underlying offense in the felony-firearm count in the complaint and the information. Carrying a concealed weapon is specifically precluded from serving as an underlying felony to sustain a felony-firearm conviction, MCL 750.227b(1), and the prosecutor did not list resisting and obstructing as an underlying offense in the felony-firearm count. Therefore, defendant's sentence for felony firearm must only run consecutively to the sentence for the predicate offense of felon in possession. Accordingly, we remand to the trial court for correction of the judgment of sentence so that the sentence for count II (felony firearm) runs consecutively only to the sentence for count I (felon in possession).

We affirm defendant's convictions, but remand for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Michael R. Smolenski  
/s/ Henry William Saad  
/s/ Kurtis T. Wilder